NATIONAL WILDLIFE FEDERATION ET AL.

IBLA 93-629 Decided June 17, 1997

Appeal from a Decision of the Montana State Office, Bureau of Land Management, approving amendment 008 to the Golden Sunlight Mine operation and reclamation plan.

Affirmed.

1. Mining Claims: Plan of Operations

A decision approving an amendment to a mine plan of operations and reclamation based on a finding of no significant impact, will be affirmed when the record establishes that BLM took a "hard look" at the environmental consequences of the proposed action, identified the relevant areas of environmental concern, made a reasonable finding that the impacts studied are insignificant and, with respect to any potentially significant impacts, the record supports a finding that mitigating measures have reduced the potential impacts to insignificance.

APPEARANCES: Thomas France, Esq., Missoula, Montana, and David K.W. Wilson, Esq., Helena, Montana, for Appellants; Alan L. Joscelyn, Esq., and James B. Lippert, Esq., Helena, Montana, for Golden Sunlight Mines, Inc., Karan L. Dunnigan, Esq., Office of the Solicitor, U.S. Department of the Interior, Billings, Montana, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

This appeal is brought by National Wildlife Federation (NWF) and others 1/ from a July 15, 1993, Decision of the Montana State Office, Bureau of Land Management (BLM or the Bureau). The BLM Decision was issued on remand from the Board's prior Decision in this case, cited as National Wildlife Federation, 126 IBLA 48 (1993).

In our prior Decision, we reviewed the June 30, 1990, record of decision (ROD) and associated finding of no significant impact (FONSI) issued

1/ Other parties appealing include Mineral Policy Center, Montana Environmental Information Center, Northern Plains Resource Council, and Sierra Club. Appellants will be referred to collectively as NWF.

by the Butte (Montana) District Manager, BLM, approving amendment 008 to the Golden Sunlight Mine operating and reclamation plan. Approval of the amended plan had been requested by mine operator Golden Sunlight Mines, Inc. (GSM). The BLM ROD and FONSI were based on the analysis found in an environmental assessment (EA) and on further mitigating stipulations developed subsequent to the EA which were "incorporated by reference." The amendment authorized expansion of the gold mining operation through Stage V.

A focal point of the prior appeal was the lack of certainty regarding the effectiveness of reclamation of waste rock dumps. The permit, as amended in 1990, allowed GSM to defer reclamation of the waste rock dumps while it ran test plots with slopes of 2:1 (ratio of 2 horizontal units to 1 vertical unit, sometimes referred to as 2h:1v). If the test slopes proved successful then GSM would be allowed to proceed with the reclamation using waste rock dumps with 2:1 slopes. An unsuccessful test would result in GSM being required to reclaim using 3:1 slopes. After noting both the ambiguity disclosed in the EA regarding the prospects of successful reclamation using 2:1 slopes (as opposed to 3:1 slopes) and the stipulations attached to the permit as a result of comments received on the EA, we held that:

> It is clear from the record that the appeal in this case must be decided not solely on the basis of the analysis of the proposed action in the May 1990 EA itself. Rather, the reasonableness of the action must also be judged in light of the analysis of comments responding to the EA and the changes (stipulations) imposed on the proposed action as a result of comments filed. The issue is whether the record establishes that BLM and DSL [2/] took a "hard look" at the environmental consequences of the proposed action, identified the relevant areas of environmental concern, made a reasonable finding that the impacts studied are insignificant and, with respect to any potentially significant impacts, whether the record supports a finding that mitigating measures have reduced the potential impacts to insignificance. Cabinet Mountains Wilderness v. Peterson, 685 F.2d at 681-82; Powder River Basin Resource Council, 120 IBLA 47, 56 (1991); Tulkisarmute Native Community Council, 88 IBLA at 216.
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> The EA acknowledged potential reclamation problems using 2h:1v slopes on waste rock dumps, noting that slope reduction to 3h:1v was recommended by the regulatory agencies because of the erosion potential on long steep slopes (EA at 93, 99). The response to comments on the EA indicates that: "GSM successfully

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2/ The EA in this case was jointly prepared by the Montana Department of State Lands (DSL), the agency with jurisdiction under State law to issue permits to mine metals and by BLM.

argued that they should be given a chance to test the 2:1 since the agencies could not prove that 2:1 slope reclamation would fail" (Comments on Golden Sunlight EA at 15, No. 62). Although reclamation to 3h:1v slopes was not required as a condition of permit approval, BLM and DSL claim that GSM has been required to file a bond to guarantee the cost of reclamation to 3h:1v while establishing a test plot to evaluate the effectiveness of reclamation with a 2h:1v slope (EA at 93). 5/ In answer to a comment on the EA noting the doubt regarding success of long term reclamation, the response was:

> The agencies do not have enough data to conclude that the stipulated reclamation plan will guarantee long term reclamation success at this time. Hopefully, the stipulations attached to their permit on reclamation test plots and continual monitoring will provide the information needed to ensure future Montanans are not asked to reclaim GSM's disturbances at some time in the future. Bond has been increased from 1.8 million to 38.6 million for the mine expansion to ensure that GSM will pay the true reclamation cost.

(Comments on Golden Sunlight EA at 22, No. 91). Responding to another comment objecting to allowance of reclamation on a 2h:1v slope, it was stated that: "GSM must meet stringent agency success criteria which will be difficult to achieve. If the tests fail, reclamation of the remaining dumps will be at 3:1" (Comments on Golden Sunlight EA at 23-24, No. 94).

5/ The EA discussion of the GSM proposal with supplemental commitments (Chapter IV) indicates that:

"GSM committed to testing and evaluating 2h:1v slope reclamation on the waste rock dumps while submitting a bond for 3h:1v slopes (BLM Letter to DSL, March 2, 1990). A reclamation test plot is to be established on one of the waste rock dumps using reclamation plan methodologies currently permitted. If reclamation attempts fail, GSM has committed to reducing the slopes to 3h:1v. During the life of the mine, GSM would develop a more detailed reclamation plan based on reclamation test plot results. The agencies and the mining company have agreed on reclamation success parameters to be used to evaluate the waste rock dump test results proposed by GSM * * *." (EA at 93). Although BLM, DSL, and GSM all recognize the existence of the commitment to alter slopes to 3:1 and of bonding adequate to guarantee this work, the source of this commitment is not cited. Review of the record discloses that the commitment "to reduce the slopes, as necessary, to as much as 3h:1v, if the reclamation test plot fails to achieve the success parameters agreed

> upon by the agencies and GSM" is expressly stated in GSM's June 1990 comments on the EA which are incorporated by reference in the DSL decision approving the permit amendment (GSM Comments of June 27, 1990, at 17; DSL Decision at 1).

126 IBLA at 56-57.

Recognizing that "[i]t is somewhat unusual to predicate a FONSI on a program of monitoring coupled with contingency plans for alternate mitigation measures," we held that when the record discloses an analysis of the impacts of the proposed action and the imposition of stipulations designed to mitigate any potentially significant impacts, use of monitoring to determine the choice of alternate methods of mitigation does not itself compel reversal of a FONSI. Id. at 61. We set aside and remanded the BLM Decision in part, however, because the record disclosed an apparent "deficiency regarding the adequacy of the contingency reclamation commitments to mitigate any potentially significant impacts." Id. at 62. In particular, we noted a statement in the record regarding bonding to the effect that if the dump test fails, the bond for reducing the slopes to 3:1 does not allow for the cost of soil recovery, liming, etc., that will be necessary to reclaim slopes that fail. Id. at 62-63. Accordingly, we found "unless GSM is willing to forego the option of testing 2:1 slopes, the failure of which would pose additional costs which have not been bonded, GSM must provide a bond to cover those costs." Id. at 63.

The present appeal arises from the proceedings on remand. After the matter was remanded to BLM, NWF sent a letter dated May 13, 1993, to BLM asserting that the proper reading of the Board's Decision was that the bond was inadequate to ensure reclamation if 2:1 slopes were chosen as the preferred method of reclamation and those slopes subsequently failed. Thus, in the view of NWF, the Board required that the bond be adequate to reclaim the entire area permitted for reclamation at 2:1 slopes, not just the test plots. In its response to NWF dated May 28, 1993, BLM expressed its view that the increased bonding requirement applied only to the 2:1 test slopes. On that same day BLM issued a notice entitled "Modification to Plan of Operations Required" in which it set out its preliminary cost estimates for reclaiming the 2:1 test plots should they fail. The notice stated that GSM could submit a reclamation bond for the amount determined by the District Manager to cover the cost of test slope failure or BLM would modify the existing reclamation plan to forego testing 2:1 slopes.

On July 15, 1993, the BLM State Director approved the plan of operations for amendment 008. That Decision was based on the provision of an increased bond of $443,000, effective July 6, 1993, which was deemed sufficient to ensure reclamation of the test slopes in case of failure. This appeal followed that approval. 3/

3/ By Order dated Sept. 21, 1993, GSM's motion to intervene was granted. Its response was received on Oct. 19, 1993.

The essential issue before us is whether the BLM Decision on remand is consistent with our prior ruling in this matter. Noting the doubts expressed in the record regarding the success of reclamation of waste rock dumps with a 2:1 slope, it is contended by NWF that GSM is required to provide a bond sufficient to reclaim all waste rock dumps to a 3:1 slope. Thus, NWF argues the bond requirement applies not only to the test waste rock dumps, but to all waste rock dumps which may be permitted at a slope of 2:1 in the event that the test is deemed successful which slopes may subsequently fail.

In its answer, BLM contends that NWF misconstrues the Board's Decision and ignores its plain language. It points out that the Board found that BLM, DSL and GSM had made impressive efforts to ensure successful reclamation and to avoid significant adverse environmental impacts. National Wildlife Federation, 126 IBLA at 58. Moreover, BLM asserts that the question of whether slopes may be successfully reclaimed at slopes of 2:1 will be resolved before reclamation (other than test plots) is allowed to proceed. If GSM is able to meet what BLM terms "stringent" agency success criteria for 2:1 slopes, then successful reclamation will be assured and there will be no significant adverse environmental impacts. It states that GSM has provided a bond that is sufficient to cover the costs of reclaiming 2:1 test slopes that fail.

A response to the appeal has also been filed on behalf of GSM arguing that the bond requirement noted by the Board applies to the 2:1 test slopes which are the only 2:1 dump slopes which have been authorized in the permit. It is contended that it would be premature to require a bond for reclamation of all waste rock dumps to a 3:1 slope in the absence of any authorization for a 2:1 slope other than on the test plots. Further, GSM asserts that the reclamation of waste rock dumps will not occur at 2:1 slopes unless the test slope reclamation is successful.

[1] It is clear that the BLM Decision to approve the amended permit including provision for a test of waste rock dumps with a slope of 2:1 was predicated on a FONSI which was based on the EA and the comments received thereon including the stipulations developed as a part of that process. As we noted in our prior Decision, the issue in this context is whether the record establishes that BLM and DSL took a "hard look" at the environmental consequences of the proposed action, identified the relevant areas of environmental concern, made a reasonable finding that the impacts studied are insignificant and, with respect to any potentially significant impacts, whether the record supports a finding that mitigating measures have reduced the potential impacts to insignificance. Cabinet Mountains Wilderness v. Peterson, 685 F.2d 678, 681-82 (D.C. Cir. 1982); Powder River Basin Resource Council, 120 IBLA 47, 56 (1991). Acknowledging the reclamation risks associated with 2:1 dump slopes, it was noted in the record that reclamation of waste rock dumps using slopes of 2:1 would not be authorized (except for test plots) unless and until monitoring of the test plots establishes that successful reclamation can be achieved. In view of the indications in the record that bonding was insufficient to ensure the reclamation of slopes to 3:1 in the event the dump test fails, we remanded

the case to BLM to either obtain the appropriate bond or eliminate the test of 2:1 dump slopes. We are not persuaded that BLM failed to take a hard look at the environmental consequences of the permitted action and make a reasoned finding that mitigating measures have reduced potential impacts to insignificance. While long term reclamation success is important, it appears that 2:1 slopes are not authorized unless and until reclamation success is established by testing and that, meanwhile, bonding is adequate to reduce test dump plots to a 3:1 slope.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is affirmed.

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C. Randall Grant, Jr.
Administrative Judge

I concur:

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Bruce R. Harris
Deputy Chief Administrative Judge